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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK
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No. 08-

IN THE

Supreme Court of the United States

DANIEL G. WOLF,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

JOHN MILLER CARROLL
JOHN MILLER CARROLL LAW OFFICE
Attorney for Petitioner
226 South State Street
Appleton, Wisconsin 54911
(920) 734-4878

223190

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does the State's lack of "good faith" to keep a piece of exculpatory evidence equate to a showing of bad faith, therefore requiring a dismissal for a denial of the right to due process, as required by *Arizona v. Youngblood*, 488 U.S. 51 (1988)?

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STATUTES AND RULES

Wis. Stats. § 346.63(1)(a) 2

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order, by the Supreme Court of Wisconsin, denying Petitioner's Motion for Reconsideration is reprinted in this Petition's Appendix C. The opinion of the Wisconsin Court of Appeals is unpublished, but may be found under the State of Wisconsin citation 2008AP451-CR and is reprinted in this Petition's Appendix A. The State of Circuit Court's opinion is included in this Petition's Appendix B via transcript.

JURISDICTION

The Supreme Court of the State of Wisconsin denied the motion for reconsideration on February 13, 2009. The Court has jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no specific federal statutes involved in this petition. This petition deals primarily with the State of Wisconsin's interpretation of Federal Case Law and the United States Constitution.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Petitioner, Daniel G. Wolf, was traveling southbound on his motorcycle on Highway 41 in Outagamie County, Wisconsin on September 2, 2006. State Trooper Lewis Judge observed the motorcycle travel southbound on US Highway 41. According to Trooper Judge, the motorcycle left the travel portion of the roadway with both wheels, traveled beyond the fog line about 6 inches and then abruptly swerved back into the lane of traffic and to the left side of the right lane and then corrected once again.

Trooper Judge continued to follow the motorcycle onto the exit ramp of Ballard Road in Outagamie County, Wisconsin. At the top of the ramp, according to Trooper Judge, the operator of the motorcycle stopped for the red light but did not turn right on red although it would have been legal. Trooper Judge also noticed that the motorcycle operator almost tipped the bike because of a loss of balance. Once the motorcycle turned right, the Trooper proceeded to turn his red and blue lights on and pull the motorcycle operator over.

Trooper Judge's squad car is equipped with a video camera. The video camera is automatically activated when the red and blue lights are turned on, although, the trooper would be able to turn on the video camera at any point in a pursuit, should he so desire.

Petitioner was arrested for Operating While under the Influence 4th Offense, in violation of Wis. Stats. § 346.63(1)(a). Petitioner did not believe his driving was

poor to justify the traffic stop. Petitioner requested a copy of the videotaped stop in order to prepare his defense.

Unfortunately for Petitioner, the recorded traffic stop by Trooper Judge subsequently went missing. During the Motion to Dismiss hearing at the trial court level, the Trooper only confirmed that the videotape was missing. He was unable to provide an explanation of what happened to the videotape.

B. PROCEEDINGS BELOW

The Petitioner's original Motion to Dismiss based on the State's failure to preserve exculpatory evidence (the videotape) was denied in the State of Wisconsin Circuit Court, Outagamie County Branch IV by the Honorable Dee R. Dyer.[1] Judge Dyer relied on the Wisconsin case of *State v. Greenwold*, 181 Wis. 2d 881, 512 N.W.2d 237 (1994). Judge Dyer recited the current law of the State of Wisconsin as

> defendant's due process rights are violated by the destruction of evidence or failure to produce evidence is the evidence destroyed is apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means, or, two, if the evidence – if the evidence was destroyed in bad faith.[2]

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1. Circuit Court opinion included in this Petition's Appendix B via transcript.

2. Transcript of Oral Ruling, Case No. 06-CT-1363, p. 3, ln. 17-25: November 21, 2007.

The Wisconsin Court of Appeals 3rd District affirmed the circuit Court for Outagamie County decision of Judge Dee R. Dyer.[3]

The Supreme Court of Wisconsin denied a Motion to Reconsider.[4]

REASONS FOR GRANTING THE PETITION

This case warrants review due to a split in authority among the jurisdictions with regard to the consequences of losing a piece of potentially exculpatory evidence.

The current controlling law in federal court with regard the unavailability of exculpatory evidence and the preservation of it is *Arizona v. Youngblood*, 488 U.S. 51 (1988). That case held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. However, Justice Stevens in his concurring opinion in *Youngblood* stated, "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *Id.* at 60. He goes on to say that a "State's failure to turn over (or preserve) potentially exculpatory evidence therefore 'must be evaluated in the context of the entire record.'" *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)).

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3. Wisconsin Court of Appeals 3rd District's unpublished opinion may be found under the State of Wisconsin citation 2008AP451-CR and is reprinted in this Petition's Appendix A.

4. Supreme Court of Wisconsin's order dismissing Appellant's Petition for Review is reprinted in this Petition's Appendix C.

Youngblood was decided in 1988 and the majority of states still follow that law. However, a trend is developing in some states to reject the law of *Youngblood*. *State v. Frasure*, 2008 Ohio 1504 ¶ 42. (*See, e.g., Deberry v. State*, 457 A.2d 744 (Del. 1983); *Thorne v. Dep't. of Pub. Safety*, 774 P.2d 1326 (Ala. 1989); *State v. Ferguson*, 2 S.W.3d 912 (Tn. 1999)). Those cases have rejected the "bight-line" rule of *Youngblood*, preferring a balancing test. *Id.*

The Supreme Court of Alaska has specifically rejected the *Youngblood* test in *Thorne v. Alaska Department of Public Safety*, 774 P.2d 1326 (Ala. 1989). In *Thorne*, the court looked at how culpable the state was, the weight of the evidence lost, prejudice on the defendant, and other evidence against the defendant at trial, instead of the test in *Youngblood*. *Id.* at 1331. The Alaska Supreme Court also said that "where the burden of preservation is so minimal, and the evidence is of even slight potential relevant, the state bears a heavy burden in justifying its destruction." *Id.* Therefore, in Alaska, the burden is not on the defendant to show bad faith, but on the State to show a justification for the destruction of the evidence.

The Alaska Court of Appeals continued to reject *Youngblood* in the unpublished case of *Price v. State*, 2000 Alas. App. LEXIS 109 (Alaska Ct. App. Aug. 9, 2000). There the court stated, "the Youngblood decision could have the unfortunate effect of encouraging the destruction of evidence to the extent that evidence destroyed becomes merely 'potentially useful' since its contents would be unprovable." *Id.* at 10.

Similarly in Delaware, the courts look at three factors when they are faced with a failure of the State to preserve evidence that could be favorable to the defendant. Those three factors are: (1) "the importance of the missing evidence," (2) "the availability of secondary evidence," and (3) "the sufficiency of the other evidence presented at trial." *Deberry v. State*, 457 A.2d 744, 752 (Del. 1983) citing *Bailey v. State*, 521 A.2d 1069, 1091 (Del. 1987). Along with those factors, the court also looks at the conduct of the State officers, although that is not determinative. *Id.*

The State of Connecticut also rejected *Youngblood* and held "under our state constitution, the good or bad faith of the police in failing to preserve potentially useful evidence cannot be dispositive of whether a criminal defendant has been deprived of due process of law." *State v. Morales*, 232 Conn. 707, 727, 657 A.2d 585 (1995). In Connecticut the trial court must look at the totality of circumstances with regard to the missing evidence and take into consideration these factors: (1) "the materiality of the missing evidence," (2) "the likelihood of mistaken interpretation of it by witnesses or the jury," (3) "the reason for its non-availability to the defense," and (4) "the prejudice to the defendant caused by the unavailability of the evidence." *Id.* at 726-27.

Tennessee also has similar balancing factors as the states mentioned above. *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). But in Tennessee, if the judge decides that the trial would still be unfair to the defendant with the absence of the evidence, the judge has other options, including dismissing the charges. *Id.* at 917.

In Massachusetts, "the fact that the police did not act in bad faith when they negligently lost the potentially exculpatory evidence cannot in fairness be dispositive of the issue." *Commonwealth v. Henderson*, 411 Mass. 309, 311, 582 N.E.2d 496 (1991). The court was able to weigh the issues and determine that the lost evidence may have exculpatory value although how much could not be determined because the evidence was lost but there was a reasonable possibility. The court also said "some mechanism should be in place to preserve information of this type." *Id.* at 310.

In Alaska, Connecticut, Delaware, Massachusetts, and Tennessee courts have rejected the bight-line rule of the *Youngblood* case and have gone with a balancing test in order to determine if the defendant's due process rights have been violated when evidence has been lost.

Finally in the state of Vermont, the defendant merely has to show a "reasonable probability" that the evidence lost was favorable. *State v. Bailey*, 144 Vt. 86, 94, 475 A.2d 1045 (1984).

Under the current law, in the majority of states, a defendant must show bad faith on the part of the state actor when exculpatory evidence is lost in order to show a violation of the defendant's due process rights. This law allows law enforcement officers or other state actors to "conveniently" lose exculpatory evidence, then claim an innocent mistake and ultimately face no sanction or detriment as a result of this negligence. But the person that potentially faces a severe detriment is the defendant when that exculpatory evidence is lost. The only defense for a person may be that exculpatory

evidence, as in the case of the Petitioner, which is lost, misplaced, or destroyed. There is no accountability on the State, as the law currently stands in most jurisdictions, to preserve the exculpatory evidence.

The current majority rule places too high of a standard on a defendant to prove. The requirement to show bad faith is an impossible burden to prove unless you are fortunate enough to witness the destruction of the tape, were present during a perceived plot to destroy the evidence or able to read a person's mind.

In addition, having a requirement for evidence preservation would allow the courts to run more efficiently. With a required procedure in place for the preservation of evidence, especially videotapes, a dispositive motion in the trial court will allow for better judicial efficiency. Had there been a video made available for viewing in the Petitioner's case, the case would not need to proceed to a trial. There would have been evidence either showing the erratic behavior justifying the stop of the Petitioner or not. The trial court judge would be able to view the videotape and make a ruling whether the traffic stop was legal. Unfortunately for the Petitioner, the video was unable to be found. This was the only evidence available for the Petitioner to put on a defense at trial, and since it was not available, it violated his due process rights.

Many states have recognized the unfairness to the defendant that *Arizona v. Youngblood* creates. Therefore this case should be granted a writ of certiorari in order to harmonize the states and create a standard for the preservation of evidence, or to establish fair guidelines when the evidence is lost or destroyed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN MILLER CARROLL
JOHN MILLER CARROLL LAW OFFICE
Attorney for Petitioner
226 South State Street
Appleton, Wisconsin 54911
(920) 734-4878

APPENDIX

APPENDIX A — DECISION OF THE COURT OF APPEALS OF THE STATE OF WISCONSIN, DISTRICT III DATED OCTOBER 21, 2008

COURT OF APPEALS OF WISCONSIN
DECISION
DATED AND FILED

October 21, 2008

David R. Schanker
Clerk of the Court of Appeals

Appeal No. 2008AP451-CR **Cir. Ct. No. 2006CT1363**

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL G. WOLF,

Defendant-Appellant.

Appeal from a judgment of the circuit court for Outagamie County: Dee R. Dyer, Judge. *Affirmed.*

Appendix A

PETERSON, J.[1] Daniel Wolf appeals a judgment of conviction for operating a vehicle while intoxicated, fourth offense. Wolf contends the circuit court erroneously denied his motion to dismiss based on the State's failure to preserve exculpatory evidence. We disagree and affirm.

BACKGROUND

State trooper Lewis Judge testified he was driving on Highway 41 around 1:30 a.m. on September 2, 2006, when he observed Daniel Wolf's motorcycle weave within its lane quite a distance ahead. After he caught up to the motorcycle, Judge observed it travel six inches over the fog line and then swerve abruptly back to the center line before easing back to the middle of the lane. Judge followed Wolf about one-half mile when Wolf exited the highway and stopped at a red light. As he stopped, Wolf almost tipped the motorcycle on its side. Wolf waited until the light turned green before proceeding, even though no traffic prevented him from making the right turn. Judge followed Wolf through the intersection and activated his emergency lights to effect a traffic stop. After Wolf stated he could not finish the walk-and-turn test and refused to complete the rest of the field sobriety tests, Judge arrested him. Testing indicated his blood alcohol concentration was .289%.

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1. This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Judge's vehicle was equipped with a video camera, which automatically begins recording when the emergency lights are turned on. The camera could also be turned on manually, but Judge had "pretty rare[ly]" done so in the past. His normal practice was to let the video come on when he activated his emergency lights. Judge testified that his initial observations of Wolf's driving would therefore not be recorded. He stated it was the Wisconsin State Patrol's written policy that troopers maintain their own videotapes for three months. No storage records are kept.

Wolf requested a copy of the videotape from the State on April 27, 2007. Judge testified he searched the filing cabinet where he stores his videotapes and was unable to find the tape. He had no idea what happened to it.

Wolf filed both a motion to suppress, claiming there was no reasonable suspicion for the traffic stop, and a motion to dismiss based on the State's loss of the videotape. A joint motion hearing was held, at which time the circuit court denied the motion to suppress. After further briefing, the court also denied the motion to dismiss. Wolf pled guilty and this appeal follows.

DISCUSSION

Wolf does not challenge the denial of the motion to suppress. Rather, he contends the circuit court erroneously denied his motion to dismiss because the State failed to preserve exculpatory evidence that could

have conclusively demonstrated Judge did not have reasonable suspicion for the traffic stop.[2]

When the State fails to preserve evidence, the defendant's right to due process can be violated in either of two ways. *State v. Greenwold*, 189 Wis.2d 59, 67, 525 N.W.2d 294 (Ct.App.1994) (*Greenwold II*). The first is when police fail to preserve evidence "that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). To satisfy this standard, the evidence must both: (1) "possess an *exculpatory value* that was *apparent* to those who had custody of the evidence . . . before the evidence was destroyed, *and* (2) . . . be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *State v. Oinas*, 125 Wis.2d 487, 490, 373 N.W.2d 463 (Ct.App.1985).

The second way is when the State, acting in bad faith, fails to preserve evidence that is merely potentially useful. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct.

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2. "A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea." *State v. Aniton*, 183 Wis.2d 125, 129, 515 N.W.2d 302 (Ct.App.1994). Nonetheless, the guilty-plea-waiver rule is a rule of administration and not of power. *State v. Riekkoff*, 112 Wis.2d 119, 124, 332 N.W.2d 744 (1983). Because the State did not argue waiver and instead addressed the merits of Wolf's evidence destruction claim, we elect to also reach the merits.

333, 102 L.Ed.2d 281 (1988); *State v. Greenwold,* 181 Wis.2d 881, 884-85, 512 N.W.2d 237 (Ct.App.1994) (*Greenwold I*) (adopting the federal *Youngblood* analysis). The defendant has the burden of proving bad faith, by showing the State acted with official animus or made a conscious effort to suppress the evidence. *Greenwold II,* 189 Wis.2d at 69-70, 525 N.W.2d 294.

When reviewing a claim that evidence was lost or destroyed in violation of due process, we independently apply the constitutional standard to the facts as found by the circuit court. *Id.* at 66-67, 525 N.W.2d 294. At the circuit court level, Wolf conceded the videotape was not apparently exculpatory, arguing only that he met the potentially useful test. On appeal, Wolf contends he satisfied his burden under both the apparently exculpatory and potentially useful standards.[3]

First, as to the apparently exculpatory standard, Wolf disputes what the tape would have shown if the video recorder was running prior to initiation of the traffic stop. However, the circuit court accepted Judge's testimony that the video camera did not commence

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3. The circuit court concurred with Wolf's initial position, concluding "there is nothing known of any real or actual exculpatory value in this tape...." The State has briefed the issue of whether the videotape constituted apparently exculpatory evidence. Therefore, because the circuit court considered the issue, we also address it despite Wolf's earlier concession. Further, the initial determination of whether the evidence was apparently exculpatory or merely potentially useful is a component of the broader due process analysis.

recording until he turned on the vehicle's emergency lights. Given that finding, Wolf cannot show the tape had any exculpatory value that would have been apparent to Judge prior to the tape's loss or destruction. In essence, regarding the pertinent timeframe, no video ever existed.

Further, even if the tape did include the earlier events, Judge's testimony indicated the tape would have been inculpatory—not exculpatory. Again, the circuit court accepted that testimony as truthful. In response, Wolf complains it is impossible to meet the apparently exculpatory standard in the context of a missing videotape.

In a case cited by the State, our supreme court recognized the impossibility of proving the precise contents of a destroyed audiotape and held it was unnecessary for a defendant to demonstrate a tape's contents were exculpatory. *State v. Amundson*, 69 Wis.2d 554, 577-78, 230 N.W.2d 775 (1975). But, foreshadowing the federal *Youngblood* ruling, the court held it was then necessary to assess the good or bad faith of the State in such a circumstance. *Amundson*, 69 Wis.2d at 577-80, 230 N.W.2d 775.[4]

4. However, in contrast to the federal standard later adopted by this court in *Greenwold I*, *Amundson* applied a totality of the circumstances test, holding it was necessary to take into consideration the degree of negligence or bad faith by the government, the importance of the evidence lost, and the other evidence of guilt adduced at trial. *State v. Amundson*, 69 Wis.2d 554, 577-80, 230 N.W.2d 775 (1975); *State v. Greenwold*, 181 Wis.2d 881, 512 N.W.2d 237 (Ct.App.1994) (*Greenwold I*). The parties here do not address the differing standards set forth in those cases.

(Cont'd)

Turning to the potentially useful standard, Wolf acknowledges there is no evidence indicating the State intentionally misplaced or destroyed the tape in an attempt to suppress evidence. Instead, Wolf argues the State's lack of good faith to preserve the tape constitutes bad faith under *Greenwold I*. That contention was explicitly rejected in *Greenwold II*, 189 Wis.2d at 68-69, 525 N.W.2d 294 ("[T]here is no bad faith when the police negligently fail to preserve evidence which is merely potentially exculpatory."). Therefore, Wolf also failed to satisfy the standard for potentially useful evidence. While the State was unable to explain what ultimately happened to the videotape, Wolf did not make a specific request for it until nearly eight months after the incident. Judge was only required by State Patrol guidelines to maintain the tape for three months.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)4.

(Cont'd)

While *Greenwold II* observed that our state due process clause is the substantial equivalent of the federal version, neither *Greenwold* case mentioned the earlier *Amundson* opinion. *State v. Greenwold*, 189 Wis.2d 59, 67, 525 N.W.2d 294 (Ct.App.1994) (*Greenwold II*). Our independent research did not reveal any case by our supreme court endorsing the holding in *Greenwold I*. Nonetheless, the matter is not dispositive in this case, as we would reach the same result under either standard. We apply the *Greenwold I* standard, because that is the approach utilized by both parties.

APPENDIX B — ORAL RULING OF THE CIRCUIT COURT OF THE STATE OF WISCONSIN, OUTAGAMIE COUNTY DATED NOVEMBER 21, 2007

CIRCUIT COURT
STATE OF WISCONSIN
OUTAGAMIE COUNTY

Case No. 06-CT-1363

STATE OF WISCONSIN,

Plaintiff,

-vs-

DANIEL G. WOLF,

Defendant.

ORAL RULING

BEFORE: **HONORABLE DEE R. DYER**
Circuit Court Judge, Branch VI
Outagamie County Justice Center
Appleton, WI 54911

DATE: November 21, 2007

APPEARANCES: **AMY MENZEL**
Assistant District Attorney

JOHN M. CARROLL
Attorney at Law

Appendix B

PROCEEDINGS

THE COURT: This is *State of Wisconsin v. Daniel Wolf.* It's File No. 06CT1363. Miss Menzel appearing on behalf of the State, Mr. Carroll on behalf of Mr. Wolf, and Mr. Wolf appears in person.

The Court is prepared today to issue a decision with respect to the defendant's motion to dismiss or suppress evidence — motion to dismiss, basically, because of the lack of production of this videotape that may have been in the officer's camera, and that he may have taken a videotape of this incident.

I've reviewed all of the briefs. I certainly heard the testimony regarding it I don't need any additional argument unless somebody has a persistent wish to make one.

Mr. Carroll?

ATTORNEY CARROLL: Your Honor, I just — I just want to put in the record what my position on this is, that the current case law in this jurisdiction does not properly address the fundamental issue of when evidence gets destroyed. I think there should be some minimal burden on the State to show why the evidence wasn't produced, and that's the essential disagreement I have with the current status of the law. I think I sort of outlined that in my brief, but I understand the very high burden that the defendant has, and we just respectfully disagree with it.

THE COURT: Ms. Menzel, anything you would like to say today?

ATTORNEY MENZEL: I have nothing to add in addition to the brief that was filed by Attorney Sager.

THE COURT: All right. Thank you. The defendant here asserts that the loss or the failure to produce this videotape of the night of the stop requires a dismissal of this action alleging a violation of due process.

This is the law, and the law in the state of Wisconsin as it presently sits is in *State v. Greenwold*, and that's G-r-e-e-n-w-o-l-d, 181 Wis.2d 881, and that is, that defendant's due process rights are violated by the destruction or failure to produce evidence if the evidence destroyed is apparently exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means, or, two, if the evidence — if the evidence was potentially exculpatory and was destroyed in bad faith.

Now here the defendant in his brief, and prior in argument, acknowledges that there is only potential exculpatory evidence in this videotape. There is nothing known of any real or actual exculpatory value in this tape, or in this supposed videotape, so we must look at the second test in *Greenwold* which says, if the evidence was only potentially exculpatory, then the defendant must show to the Court that it was destroyed in bad faith, and the defendant bears the burden, according to our law in this state.

Appendix B

I must find here that the defendant has failed to show that. At the hearing on September 20th of this year, Trooper Judge testified that it is his normal practice to leave a tape in his VCR unit — in his squad car in the unit. The VCR starts automatically once the officer turns on his red and blue lights. Trooper Judge testified that he can turn the recorder off sooner by pressing a button, or he can stop recording by shutting down the system, but he testified on the night in question he simply followed his normal practice and allowed the system to turn on automatically with the turning on of his overhead lights. He further testified that it is his department's written policy to retain the videotapes for approximately three months. I do note that this incident occurred on September 2nd, 2006, so that's a considerable period of time ago, over a year, but there is no clear record here of any request within that three months, and the trooper went on to testify that copies are not regularly made for the District Attorney's office unless one is requested by the District Attorney's office. The officer did not remember exactly when the request came in for the copy of the tape.

Trooper Judge testified that he did not know what happened to the videotape. There has not been any evidence presented to the Court that could support an inference of bad faith in this case, and certainly there is not enough evidence to show a finding of bad faith. Trooper Judge simply does not know what happened to the tape, and that does not create bad faith on the State's part.

Further, Trooper Judge's testimony was that the videotape will only record once the overhead lights were engaged, thus, none of the alleged driving behavior would have been recorded because he didn't turn on his red lights until right at the end of the driving here, and then the stop occurred very quickly. Trooper Judge testified that the video would be of the officer approaching the vehicle and performing field sobriety tests. The officer testified that the only field sobriety tests that he conducted was the horizontal gaze nystagmus, and therefore, the video from his squad car, there is an inference that there would not be a lot that would be displayed by that vehicle in any event because it's not close up. I don't know at that time of the day — let's just take a look what time of the day it was. Even in broad daylight, I don't know how a video camera would show movement of the defendant's eyes. This happened at 1:30 in the morning.

So, the Court does find that there was only potentially exculpatory, and that would be minimal, at best, evidence in this videotape, and certainly that the defendant has met not his burden to show that there was bad faith on the part of the State in not producing this videotape.

So the motion to dismiss is denied.

What did you want to do then today?

ATTORNEY CARROLL: We're going to be entering a plea on the charge today, Your Honor.

THE COURT: Miss Menzel, what is the status here with respect to this today?

ATTORNEY MENZEL: Upon a plea to Count 1, the State will move to dismiss Count 2. The State will not move to dismiss the refusal.

The State would be recommending for the blood alcohol of .289 a $2600 fine plus court costs for a total of $3,745. The State is recommending 170 days in jail, which is lower than, I believe, the guidelines based on the fact the defendant is in treatment or has started treatment. We would ask for 36-month revocation of driving privileges, and an ignition interlock device. Defense is free to argue.

THE COURT: Mr. Carroll?

ATTORNEY CARROLL: I think the — that might have been a typo in the plea offer about the refusal not being dismissed.

ATTORNEY MENZEL: I have that in two places in our file, that the State is not dismissing the refusal, but it's Attorney Sager's case and he's not available today to —

THE COURT: Do this on another day?

ATTORNEY CARROLL: That's fine, because I think we discussed that.

THE COURT: Let's do it on a different day. 10:15 next Friday morning, December 30th?

ATTORNEY CARROLL: Yup. That would work for me.

THE COURT: All right. 10:15, Friday, November 30th. Thank you.

(Proceedings concluded.)

APPENDIX C — ORDER OF THE SUPREME COURT OF WISCONSIN DENYING PETITION FOR REVIEW DATED FEBRUARY 13, 2009

OFFICE OF THE CLERK

SUPREME COURT OF WISCONSIN

110 EAST MAIN STREET, SUITE 215
P.O. Box 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

February 13, 2009

Nos. 2008AP451-CR *State v. Wolf*
L.C.#2006CT1363

& 2009AP362-W *Wolf v. Gehring*
L.C.#2006CT1363

A motion having been filed on behalf of defendant-appellant, Daniel G. Wolf, to reconsider this court's November 21, 2008, order dismissing the petition for review filed in this case, and the court further deeming the motion for reconsideration to be a petition for writ of habeas corpus, and the court having considered the habeas petition and the petition for review filed on November 21, 2008;

Appendix C

IT IS ORDERED the motion for reconsideration is denied. The 30-day period in which to file a petition for review may not be enlarged. *First Wisconsin National Bank of Madison v. Nicholaou*, 87 Wis. 2d 360, 274 N.W.2d 704 (1979).

IT IS FURTHER ORDERED that the motion for reconsideration shall be deemed to be a petition for writ of habeas corpus.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus is granted.

IT IS FURTHER ORDERED that the relief requested in the habeas petition, that the petition for review filed in *State v. Wolf*, Case No. 2008AP451-CR, be reinstated and deemed timely-filed, is granted. *See State ex rel. Nichols v. Litscher*, 2001 WI 199, 247 Wis. 2d 1013, 635 N.W.2d 292; *State ex rel. Schmelzer v. Murphy*, 201 Wis. 2d 246, 548 N.W.2d 45 (1996).

IT IS FURTHER ORDERED that the petition for review is denied, without costs. The petition does not meet any of the criteria for review in Wis. Stat. § 809.62(1r).

David R. Schanker
Clerk of Supreme Court